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14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

17 ALCON ENTERTAINMENT, LLC
18 a Delaware Limited Liability Company,

19 Plaintiff,

20 v.
21

22 TESLA, INC., a Texas Corporation;
23 ELON MUSK, an individual;
24 WARNER BROS. DISCOVERY,
INC., a Delaware Corporation,

25 Defendants.
26
27
28

Case No. 2:24-cv-09033-GW-RAO

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
TESLA, INC. AND ELON MUSK'S
MOTION TO DISMISS**

Hearing Date: March 6, 2025

Hearing Time: 8:30 a.m.

Courtroom: 9D

Judge: Hon. George H. Wu

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RELEVANT BACKGROUND	2
	A. Plaintiff’s Unsupported Allegations.....	2
	B. The October 10, 2024 Event	2
	C. The Tesla-WBDI Contract Does Not Require Brand Affiliation	3
III.	LEGAL STANDARD	3
IV.	ARGUMENT.....	4
	A. Plaintiff Fails to State a Claim for Direct Copyright Infringement	4
	1. The Court Can Decide Substantial Similarity Now.....	5
	2. There Is No Substantial Similarity	7
	B. Plaintiff Fails to State a Claim for Vicarious and Contributory Copyright Infringement.....	13
	C. Plaintiff Fails to State a Lanham Act Claim for False Endorsement.....	17
	1. Plaintiff’s Claim is Not a Cognizable Lanham Act Claim Because It Is Based on Rights Within the Scope of Copyright	18
	2. Plaintiff Fails to Plead Trademark Rights in “Blade Runner” or Any Images from BR2049	22
V.	CONCLUSION	24
	CERTIFICATE OF COMPLIANCE.....	25

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)	3
<i>Bell v. Pac. Ridge Builders, Inc.</i> , No. 19-CV-01307-JST, 2019 WL 13472127 (N.D. Cal. June 4, 2019)	15, 16
<i>Brown v. Netflix, Inc.</i> , 462 F. Supp. 3d 453 (S.D.N.Y. 2020), <i>aff'd</i> , 855 Fed. Appx. 61 (2d Cir. 2021)	9
<i>Comedy III Prods., Inc. v. New Line Cinema</i> , 200 F.3d 593 (9th Cir. 2000), <i>as amended on denial of reh'g and</i> <i>reh'g en banc</i> (Feb. 4, 2000)	17, 18, 19
<i>Corbello v. Valli</i> , 974 F.3d 965 (9th Cir. 2020)	5
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23, 123 S.Ct. 2041, 156 L.Ed.2d 18 (2003)	19, 20, 21, 22
<i>DuMond v. Reilly</i> , No. CV 19-8922-GW-AGRX, 2021 WL 733311 (C.D. Cal. Jan. 14, 2021) (Wu, J.)	6
<i>Erickson Productions, Inc. v. Kast</i> , 921 F.3d 822 (9th Cir. 2019)	14, 15, 16, 17
<i>In re Gilead Scis. Sec. Litig.</i> , 536 F.3d 1049 (9th Cir. 2008)	4
<i>Google LLC v. Oracle Am., Inc.</i> , 593 U.S. 1, 141 S.Ct. 1183, 209 L.Ed.2d 311 (2021)	5
<i>Jangle Vision, LLC v. Alexander Wang Inc.</i> , No. CV 21-9964-GWEX, 2022 U.S. Dist. LEXIS 110600 (C.D. Cal. June 3, 2022) (Wu, J.), <i>aff'd</i> , No. 22-55642, 2023 U.S. App. LEXIS 28483 (9th Cir. Oct. 26, 2023)	5

1	<i>Johnson v. Maraj</i> ,	
2	No. CV 23-5061 PA, 2023 WL 8883316 (C.D. Cal. Dec. 15, 2023).....	13
3	<i>Lee v. City of Los Angeles</i> ,	
4	250 F.3d 668 (9th Cir. 2001)	4
5	<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> ,	
6	572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)	18
7	<i>Lions Gate Ent., Inc. v. TD Ameritrade Servs. Co., Inc.</i> ,	
8	No. 2:15-05024-DDP-E, 2017 WL 4621541 (C.D. Cal. Oct. 16,	
9	2017)	20, 21, 23
10	<i>LIVN Worldwide Ltd. v. Vubiquity Inc.</i> ,	
11	No. 2:21-CV-09589-AB-KS, 2022 WL 18278580 (C.D. Cal. July	
12	22, 2022)	20
13	<i>Long v. Dorset</i> ,	
14	854 F. App’x 861 (9th Cir. 2021).....	17
15	<i>Marder v. Lopez</i> ,	
16	450 F.3d 445 (9th Cir. 2006)	4
17	<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> ,	
18	508 F.3d 1146 (9th Cir. 2007)	13
19	<i>Perfect 10, Inc. v. Giganews, Inc.</i> ,	
20	No. CV 11-7098-ABC-SHX, 2013 WL 3610706 (C.D. Cal. July 10,	
21	2013), <i>aff’d</i> , 847 F.3d 657 (9th Cir. 2017)	14, 15
22	<i>Pretty in Plastic, Inc. v. Bunn</i> ,	
23	No. CV 18-6091-GW-SKX, 2019 WL 1771654 (C.D. Cal. Feb. 8,	
24	2019) (Wu, J.), <i>aff’d</i> , 793 F. App’x 593 (9th Cir. 2020).....	6
25	<i>Rentmeester v. Nike, Inc.</i> ,	
26	883 F.3d 1111 (9th Cir. 2018)	<i>passim</i>
27	<i>Rice v. Fox Broadcasting Co.</i> ,	
28	148 F. Supp. 2d 1029 (C.D. Cal. 2001)	18
	<i>Rogers v. Koons</i> ,	
	960 F.2d 301 (2d Cir. 1992)	9

1	<i>Silas v. Home Box Off., Inc.</i> ,	
2	201 F. Supp. 3d 1158 (C.D. Cal. 2016) (Wu, J.), <i>aff'd</i> , 713 F. App'x	
3	626 (9th Cir. 2018)	6
4	<i>Slep-Tone Ent. Corp. v. Wired for Sound Karaoke & DJ Servs., LLC</i> ,	
5	845 F.3d 1246 (9th Cir. 2017)	20
6	<i>Sybersound Records, Inc. v. UAV Corp.</i> ,	
7	517 F.3d 1137 (9th Cir. 2008)	21, 22
8	<i>United States v. Ritchie</i> ,	
9	342 F.3d 903 (9th Cir. 2003)	4
10	<i>Urban Dollz LLC v. Lashify, Inc.</i> ,	
11	No. CV 23-1427-GW-AFMX, 2023 WL 8292459 (C.D. Cal. Oct.	
12	17, 2023) (Wu, J.)	22
13	<i>Waits v. Frito-Lay, Inc.</i> ,	
14	978 F.2d 1093 (9th Cir. 1992)	18, 22
15	<i>Zella v. E.W. Scripps Co.</i> ,	
16	529 F. Supp. 2d 1124 (C.D. Cal. 2007)	4
17	Statutes	
18	15 U.S.C. § 1125(a)	19
19	15 U.S.C. § 1127	23
20	17 U.S.C. § 102(b)	5
21	17 U.S.C. § 106	19

1 **I. INTRODUCTION**

2 Plaintiff alleges that Tesla, Inc. and Elon Musk unlawfully used an image
3 resembling a scene from the film *Blade Runner 2049* at an event promoting Tesla's
4 forthcoming "Cybercab." The allegations are without merit—both legally and
5 factually—and should be dismissed with prejudice.

6 Setting aside the personal attacks on Musk and the headline-grabbing story of
7 a supposed AI-assisted "massive economic theft," the purported copyright
8 infringement relies on the unsupported assumption that Tesla purposefully copied
9 Plaintiff's film. In truth, Tesla lawfully licensed a separate image and made
10 permissible modifications to it. But the Court need not resolve these factual disputes
11 now because a simple side-by-side comparison of the images in question
12 demonstrates that they are not substantially similar as a matter of law.

13 Plaintiff claims exclusive rights in a familiar post-apocalyptic scene, but
14 copyright law protects only creative expression, not common settings, concepts, or
15 stock images. Widely used themes and motifs cannot form the basis of a viable
16 copyright infringement claim because unprotectable elements of the image must be
17 disregarded by the Court during the comparison. When that is done here, the images
18 are not substantially similar. Because Plaintiff's claim of direct copyright
19 infringement fails as a matter of law, the contributory and vicarious claims fail too.

20 Plaintiff's claim of vicarious copyright infringement fails for an additional
21 reason. It lacks any allegation of direct financial benefit to Tesla or Musk and thus
22 fails to establish a causal link between the alleged infringement and any alleged
23 financial gain, a necessary element for vicarious liability. Without that connection,
24 the claim is legally deficient and must be dismissed.

25 Plaintiff's false endorsement claim under the Lanham Act fares no better. It
26 improperly seeks to use trademark law to address copyright issues, a tactic that many
27 courts, including the Supreme Court, have consistently rejected.

1 None of these deficiencies can be cured by amendment. Therefore, Defendants
2 Tesla and Musk respectfully request that the Court dismiss Plaintiff's Complaint in
3 its entirety, with prejudice.¹

4 **II. RELEVANT BACKGROUND**

5 **A. Plaintiff's Unsupported Allegations**

6 Plaintiff asserts copyrights in eight images taken from a scene in Blade Runner
7 2049 ("BR2049") (Comp., Dkt. 1, Exs. A & B (the "Exhibit A Image" and "Exhibit
8 B Images," collectively, "Plaintiff's Images")). The Complaint also alleges trademark
9 rights in those same images. Notably, Plaintiff does not own the "Blade Runner" name
10 or mark, yet it takes issue with Musk's mention of "*Blade Runner*" during the
11 presentation at issue. Rather, Plaintiff speculates that Tesla used an image from
12 BR2049 in conjunction with an AI tool to create an allegedly similar image (Comp.,
13 Ex. C (the "Accused Image")). Comp. ¶¶ 3, 55.

14 The uncontroverted facts, however, demonstrate that these allegations are false
15 because Defendants never used a BR2049 image to artificially generate a new image.
16 Rather, Tesla licensed a wholly different image from a stock photo agency and
17 prompted an AI-driven image editor to add "Elon Musk in trench coat looking into
18 the city." The actual facts of this case underscore what Plaintiff's Complaint lays
19 bare—a lack of substantial similarity.

20 **B. The October 10, 2024 Event**

21 On October 10, Tesla revealed its revolutionary and futuristic "Cybercab" at an
22 event titled "We, Robot" that took place at a Warner Bros. Discovery, Inc. ("WBDI")
23 studio. The event's theme was autonomous transport and its great benefits for society.
24

25 ¹ If the Court dismisses the direct copyright infringement claim against Tesla and
26 Musk for failure to plead substantial similarity, the Court should also dismiss that
27 claim against WBDI for the same reason. Tesla and Musk also understand that WBDI
28 is simultaneously moving to dismiss the vicarious copyright infringement and
Lanham Act claims for failure to state a claim.

1 To juxtapose the promising future autonomous transport provides, Musk described a
2 vision of “sci-fi movies” where “the future is dark and dismal” while the monitor
3 displayed an image of a “bleak apocalypse” with the words “NOT THIS” in large,
4 capital letters. Musk noted that while he was a fan of Blade Runner, he did not want
5 to live in “that” future. Musk continued to promote the benefits of autonomous cars.
6 The “bleak apocalypse” image lasted only eleven seconds, which comprises
7 about 0.23% of the eighty-minute presentation. A recording of the full presentation is
8 being lodged concurrently with this brief as Exhibit 2.²

9 **C. The Tesla-WBDI Contract Does Not Require Brand Affiliation**

10 Plaintiff also alleges that Tesla and WBDI are parties to a contract under which
11 WBDI leased studio space to Tesla for the event that “allowed or possibly even
12 required Tesla expressly to affiliate the “Cybercab” with one or more motion pictures
13 from WBDI’s motion picture library, or the motion picture library of WBDI’s
14 subsidiary.” Comp. ¶¶ 38-39. Nothing could be further from the truth. Plaintiff
15 repeatedly relies on the Tesla-WBDI contract, including to allege how Tesla and
16 Musk came to infringe Plaintiff’s Images and falsely affiliated the BR2049 film with
17 Tesla’s “Cybercabs”—the crux of all its causes of action. *Id.* ¶¶ 43, 94. In reality, the
18 contract (Jennings Decl., Ex. 1) is a straightforward leasing contract. It makes no
19 reference whatsoever to use of a motion picture from WBDI’s library or brand
20 affiliation.

21 **III. LEGAL STANDARD**

22 “To survive a motion to dismiss, a complaint must contain sufficient factual
23 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft*
24 *v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (cleaned up).
25 Though the Court must accept all factual allegations in a complaint as true, a court
26 need not accept “naked assertions devoid of further factual enhancement.” *Id.*

27 _____
28 ² Cited exhibits are attached to the Marchese Declaration unless otherwise noted.

1 (cleaned up). “Nor is the court required to accept as true allegations that are merely
2 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead*
3 *Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). This is particularly apt here,
4 where the Complaint contains conspiracy theories and conjecture under the guise of
5 allegations made on “information and belief.”

6 On a motion to dismiss, a court may properly consider the complaint and
7 material submitted as part of the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668,
8 688 (9th Cir. 2001). A court may also consider “evidence on which the complaint
9 necessarily relies if: (1) the complaint refers to the document; (2) the document is
10 central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy
11 attached to the 12(b)(6) motion” and “assume that its contents are true for the purposes
12 of a motion to dismiss under Rule 12(b)(6).” *Marder v. Lopez*, 450 F.3d 445, 448 (9th
13 Cir. 2006) (cleaned up); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).
14 Further, the court may consider “matters subject to judicial notice pursuant to Federal
15 Rule of Evidence 201,” including “generic elements of creative works,” when
16 deciding a motion to dismiss a copyright claim. *Zella v. E.W. Scripps Co.*, 529 F.
17 Supp. 2d 1124, 1128-29 (C.D. Cal. 2007) (taking judicial notice of generic television
18 show elements).

19 **IV. ARGUMENT**

20 **A. Plaintiff Fails to State a Claim for Direct Copyright Infringement**

21 Plaintiff’s allegations of substantial similarity are contradicted by a simple
22 comparison of the images. To maintain its claim for copyright infringement, Plaintiff
23 must plausibly allege that (1) it owns a valid copyright, and (2) Defendant copied
24 protected elements of the expression of Plaintiff’s work. *Rentmeester v. Nike, Inc.*,
25 883 F.3d 1111, 1116-17 (9th Cir. 2018), *overruled on other grounds by Skidmore v.*
26 *Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020). The second element has two distinct
27 subparts: factual copying and unlawful appropriation. *Id.* at 1117. Not all copying is
28

1 unlawful. *Id.* While Defendants did not copy at all, for the purposes of this motion,
2 Plaintiff must plausibly allege that Defendants copied its ***protectable expression***. *Id.*³
3 This Alcon has not done. And this flaw is fatal.

4 Copyright law does not protect ideas or concepts; rather, it protects only an
5 author’s original expression. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 18, 141
6 S.Ct. 1183, 209 L.Ed.2d 311 (2021). Defendants may freely use “ideas” or “concepts”
7 found in Plaintiff’s Images and indeed in countless others. *Rentmeester*, 883 F.3d at
8 1117; 17 U.S.C. § 102(b) (copyright protection does not “extend to any idea...[or]
9 concept...regardless of the form in which it is described, explained, illustrated, or
10 embodied in [the] work”). Additionally, Plaintiff must plausibly allege that
11 Defendants unlawfully copied “enough of [Plaintiff’s] expression...to render the two
12 works ‘substantially similar.’” *Rentmeester*, 883 F.3d at 1117. Importantly, similarity
13 between unprotectible elements—such as “familiar stock scenes and themes” or
14 “common elements”—will not satisfy the substantial similarity requirement. *Corbello*
15 *v. Valli*, 974 F.3d 965, 975 (9th Cir. 2020); *Skidmore*, 952 F.3d at 1069.

16 1. The Court Can Decide Substantial Similarity Now

17 The Complaint provides this Court with everything it needs to determine that
18 the Accused Image is ***not*** substantially similar to Plaintiff’s Images. Plaintiff’s Images
19 and the Accused Image are Exhibits A-C to the Complaint. Courts in this District
20 regularly dismiss copyright infringement claims at the pleadings stage. *E.g.*, Ex. 1,
21 Tentative Ruling on Defendants’ Motion to Dismiss, *adopted in final decision, Jangle*
22 *Vision, LLC v. Alexander Wang Inc.*, No. CV 21-9964-GWEX, 2022 U.S. Dist.
23 LEXIS 110600 (C.D. Cal. June 3, 2022) (Wu, J.) (“[T]here is ample authority for
24 holding that when the copyrighted work and the alleged infringement are both before
25 the court, capable of examination and comparison, non-infringement can be
26 determined on a motion to dismiss.”), *aff’d*, No. 22-55642, 2023 U.S. App. LEXIS



27 _____
28 ³ All emphases added unless otherwise noted.

1 28483 (9th Cir. Oct. 26, 2023); *DuMond v. Reilly*, No. CV 19-8922-GW-AGRX, 2021
2 WL 733311, at *25 (C.D. Cal. Jan. 14, 2021) (Wu, J.) (dismissing claim because
3 plaintiff could not plead substantial similarity of protectable elements); *Silas v. Home*
4 *Box Off., Inc.*, 201 F. Supp. 3d 1158, 1173 (C.D. Cal. 2016) (Wu, J.) (same), *aff'd*,
5 713 F. App'x 626 (9th Cir. 2018); *Pretty in Plastic, Inc. v. Bunn*, No. CV 18-6091-
6 GW-SKX, 2019 WL 1771654, at *5 (C.D. Cal. Feb. 8, 2019) (Wu, J.) (same), *aff'd*,
7 793 F. App'x 593 (9th Cir. 2020).

8 In *Rentmeester*, the district court dismissed a copyright infringement claim with
9 prejudice for lack of substantial similarity. 883 F.3d at 1116. Because the plaintiff
10 attached his asserted image and defendant's accused image to the complaint, they
11 were "capable of examination and comparison." *Id.* at 1123.

12 The Ninth Circuit affirmed the dismissal because a simple comparison of the
13 two images revealed no substantial similarity of protectable elements. *Id.* at 1124; Fig.
14 1. While Nike's image was "obviously inspired by Rentmeester's," that was not
15 enough to avoid dismissal. *Rentmeester*, 883 F.3d at 1116. The court explained that
16 the images share some similarities—namely, Michael Jordan "leaping toward a
17 basketball hoop with a basketball held in his left hand above his head" in a pose
18 "inspired by ballet's *grand jeté*." *Id.* at 1116-17. But these are just general ideas and
19 concepts. *Id.* at 1119. The images differed in legally significant ways, like the
20 background, angle, lighting/shadow, perspective, and the position and arrangement of
21 the elements within the photos. *Id.* at 1122-24.

Dismissed on the Pleadings for No Substantial Similarity: Figure 1⁴

<i>Rentmeester's (Copyrighted) Image</i>	<i>Nike's (Allegedly Infringing) Image</i>
	

Just as in *Rentmeester*, the Court should also find here that there is no substantial similarity. No additional facts are needed, and nothing disclosed during discovery will change the analysis. *Id.* at 1123.

2. There Is No Substantial Similarity

To prove substantial similarity, Plaintiff must satisfy both the “intrinsic test” and the “extrinsic test.” *Id.* at 1118. Only the extrinsic test may be determined as a matter of law, but either test can be fatal to a plaintiff’s claim. *Id.* The extrinsic test involves an objective comparison of the protected elements of the works and is applied in three steps: (1) Plaintiff must identify the protectable elements that are similar to both its Images and the Accused Image; (2) the Court disregards unprotectable elements, like “ideas, concepts, and common elements”; and (3) the Court determines whether and to what extent the remainder warrants copyright protection. Ex. 1 at 8 (quoting *Corbello*, 974 F.3d at 974). As discussed below, Plaintiff’s claim fails at the very first step. An objective visual comparison between Plaintiff’s Images and the Accused Image reveals no substantial similarity in any protectable elements.

⁴ *Rentmeester*, 883 F.3d at 1126.

1 **a) Plaintiff Fails to Identify Any Protectable Elements**
2 **Similar to Its Images and the Accused Image**

3 Under the extrinsic test, two images are substantially similar if, after the
4 unprotected elements have been filtered out, the remaining protected elements
5 represent an original “selection and arrangement” of creative choices. *Rentmeester*,
6 883 F.3d at 1119-20. To identify protectable elements, an image “can be broken down
7 into objective elements that reflect various creative choices the photographer
8 made...choices related to subject matter, pose, lighting, camera angle, depth of field,
9 and the like.” *Id.* at 1119. But no single element is copyrightable standing alone. *Id.*
10 Even “an unusual or distinctive” or “fanciful” element that is wholly the author’s
11 “own intellectual invention” does not warrant copyright protection. *Id.* (cleaned up)
12 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60, 4 S.Ct. 279, 28
13 L.Ed. 349 (1884)). “What is protected by copyright is the photographer’s selection
14 and arrangement of the photo’s otherwise unprotected elements.” *Id.* (emphasis in
15 original).

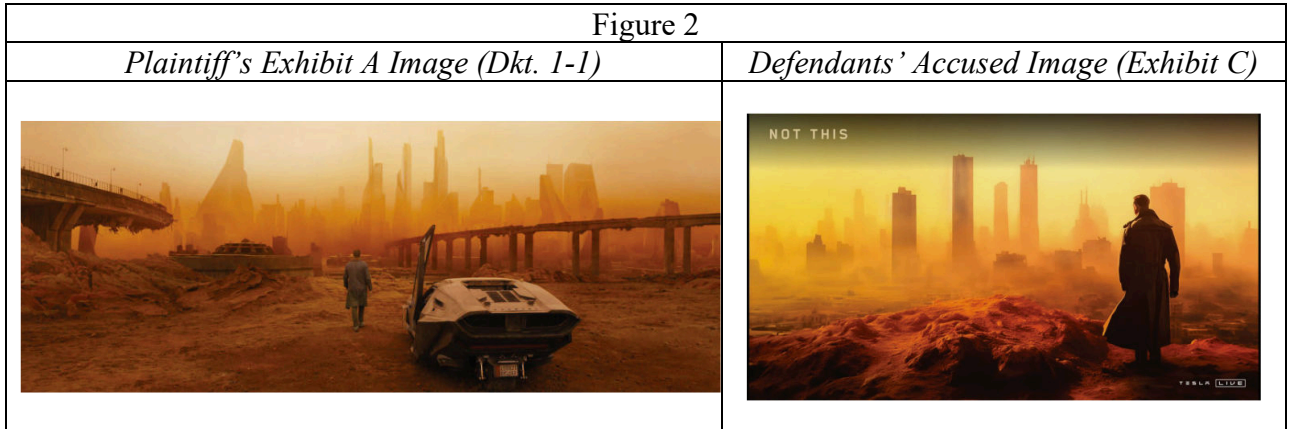
16 Here, Plaintiff bases its claim merely on unprotectable stock elements. For
17 example, Plaintiff describes “abandoned ruins of a city, all bathed in misty orange
18 light” and “an image of a man in near-silhouette, with close-cropped hair and wearing
19 a duster.” Comp. ¶¶ 54, 60. Plaintiff describes the Exhibit B Images as portraying “a
20 silhouetted trench coat-wearing man moving through a misty, orange-colored ruinous
21 urban desert landscape.” *Id.* ¶ 34. But these are merely descriptions of common scenes
22 and stock features of a dystopian/post-apocalyptic cityscape. Ex. 1 at 8 (“familiar
23 stock scenes and themes are not protected” (cleaned up)). Plaintiff asserts the Accused
24 Image “looks like a motion picture still photo” that “was clearly intended to read
25 visually either as an actual still image from BR2049[]...or as a minimally stylized
26 copy of one,” but fails to identify any *protectable* elements. Comp. ¶¶ 54-55.

1 Rather than identify any allegedly protectable elements, Plaintiff repeatedly
2 alleges its Images are the “heart of the work”—but that obtuse characterization does
3 not help Plaintiff’s infringement claim. Ex. 1 at 11 (finding claim that the alleged
4 infringer copied the “unique, original expressive essence” of its work “still left [the
5 Court] largely guessing” what plaintiff believed was protectable expression); *Brown*
6 *v. Netflix, Inc.*, 462 F. Supp. 3d 453, 463 (S.D.N.Y. 2020) (dismissing on the
7 pleadings and explaining that “[e]ven assuming [defendant took] the “heart of the
8 [work], this does not end the analysis”), *aff’d*, 855 Fed. Appx. 61 (2d Cir. 2021).
9 While an alleged infringer’s use of the “heart” of a work may be relevant to a fair use
10 analysis, a claim that an alleged infringer took the “heart” of a work will not satisfy a
11 prima facie case of substantial similarity. *E.g., Rogers v. Koons*, 960 F.2d 301, 307,
12 311 (2d Cir. 1992) (considering whether an alleged infringer took protected elements
13 of a photograph *before* reaching fair use and whether it took the “essence” of the
14 work).

15 Plaintiff still must allege protectable elements that are substantially similar
16 between Plaintiff’s Images and the Accused Image. Even construing the Complaint
17 in the light most favorable to Plaintiff, Plaintiff fails to do so. Like in *Rentmeester*,
18 where Nike’s photograph was “obviously inspired by” the plaintiff’s, Tesla and Musk
19 can incur no copyright liability for merely evoking unprotectable elements such as
20 city ruins, an orange sky, and a post-apocalyptic vibe, or “borrow[ing] only the
21 general idea or concept embodied” in Plaintiff’s work, which is all that occurred here.
22 883 F.3d at 1116, 1121.

23 **b) The Images Differ Significantly**

24 Plaintiff has not and cannot identify protectable elements that are similar
25 between Plaintiff’s Images and the Accused Image because they differ in the most
26 basic sense: the Images contain different subject matter.
27
28



Plaintiff's Exhibit A portrays a walking man, a futuristic vehicle, two crumbling bridges, a round bunker, and a skyline with futuristic buildings. Fig. 2. The man is wearing a knee-length coat. Alcon identifies the vehicle as a "spinner" and discusses its fame and recognizability. Comp. ¶¶ 35-36.

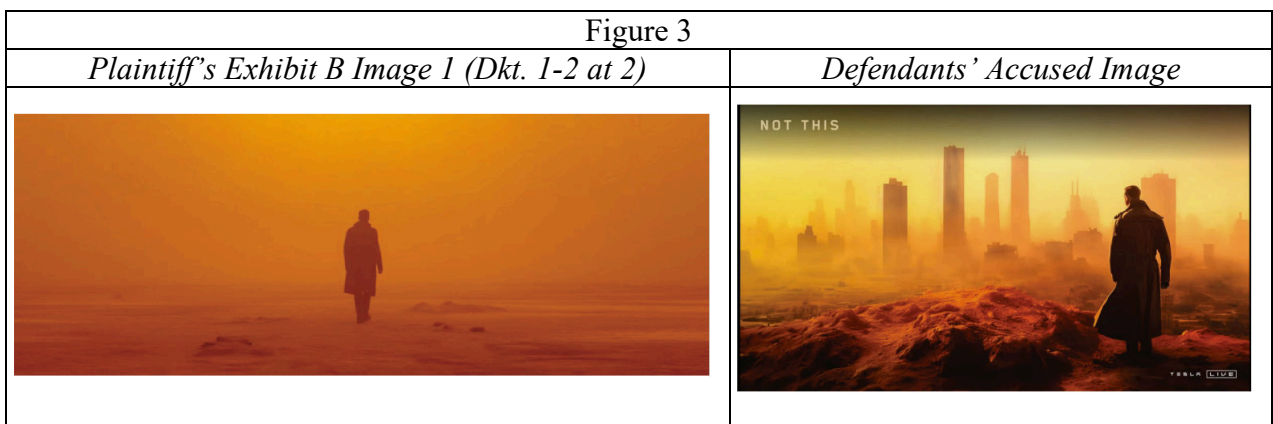
In contrast, the Accused Image portrays a man standing and looking down on a city skyline with regular shaped buildings. The image contains no bridge at all (much less two crumbling bridges), no bunker, and no famous "spinner" (or any vehicle). The skyline is quite different. The man is wearing a long coat that reaches down to his ankles. The Accused Image also contains text reading "NOT THIS" in the top-left corner and "TESLA LIVE" in the bottom-right corner. Exhibit A contains no text.

Further, Plaintiff's Exhibit A Image captures its subject matter from a different perspective than the Accused Image. In Exhibit A, the man is in the center. He is small, relative to the vehicle, creating the impression that he is farther away from the camera than the vehicle. The man is also smaller than the skyline, creating the impression that he is walking towards city buildings at the same elevation. The man is facing 180 degrees away from the camera.

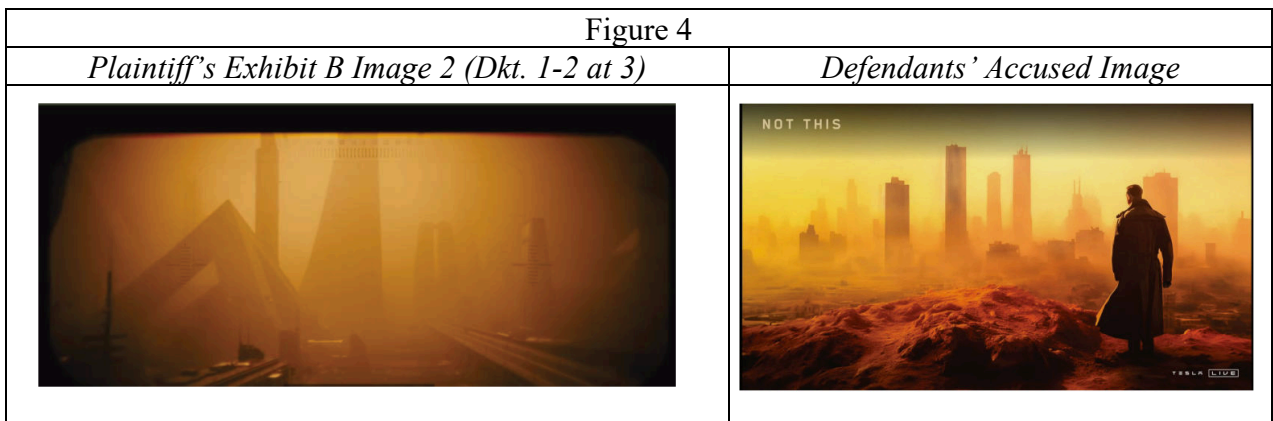
In contrast, the Accused Image portrays a man on the right side of the frame. He is the largest subject in the Image, creating the impression that he is closest to the

camera. He is taller or close in height to the city buildings, creating the impression that he is at a higher elevation, such as on a hill just outside the city. He is turned slightly away from the camera, so his profile is partially visible.

Plaintiff's Exhibit B Images differ even more drastically from the Accused Image. The first image (Fig. 3) portrays only a man in the center of a flat foreground walking away from the camera and towards a plain background—nothing like the rocky foreground and detailed city skyline background in the Accused Image.



The precise subject matter of the second image (Fig. 4) is unclear, but it contains no man and no skyline.



The third and fourth images (Figs. 5 and 6) feature sculptures of women from various angles and a man walking amongst them, subject matter that, again, is not in the Accused Image.

Figure 5

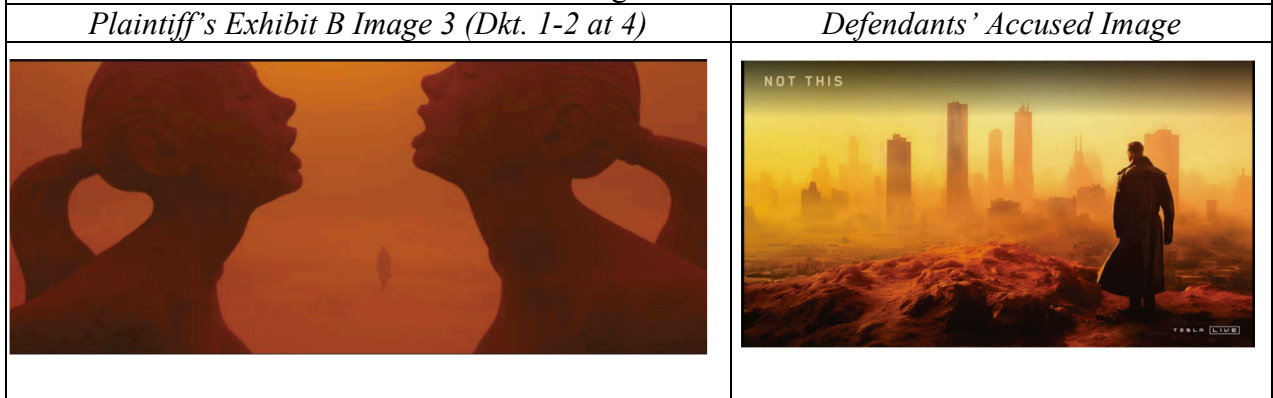
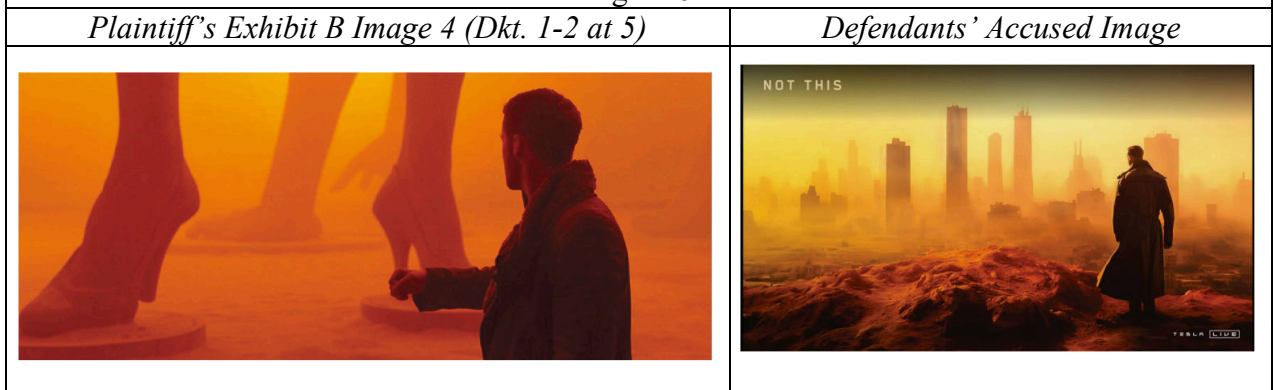
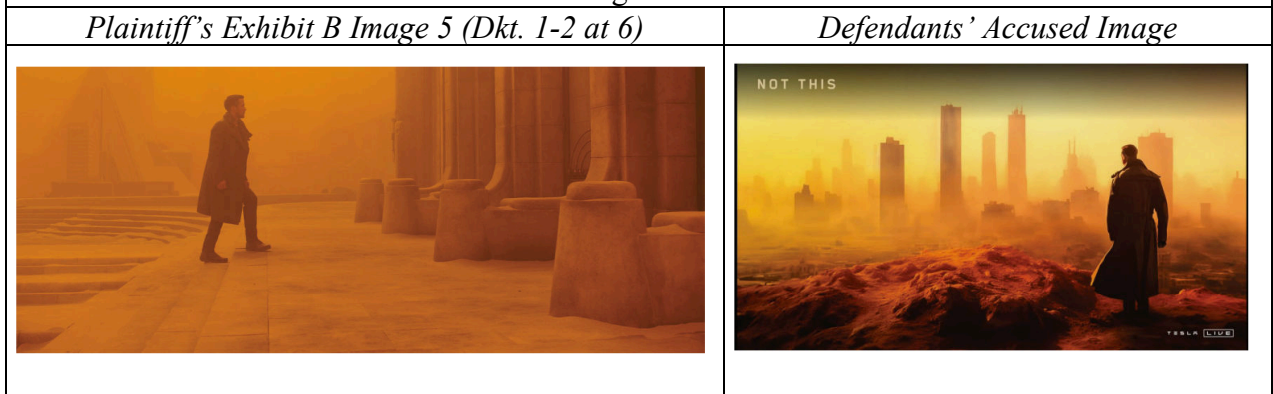


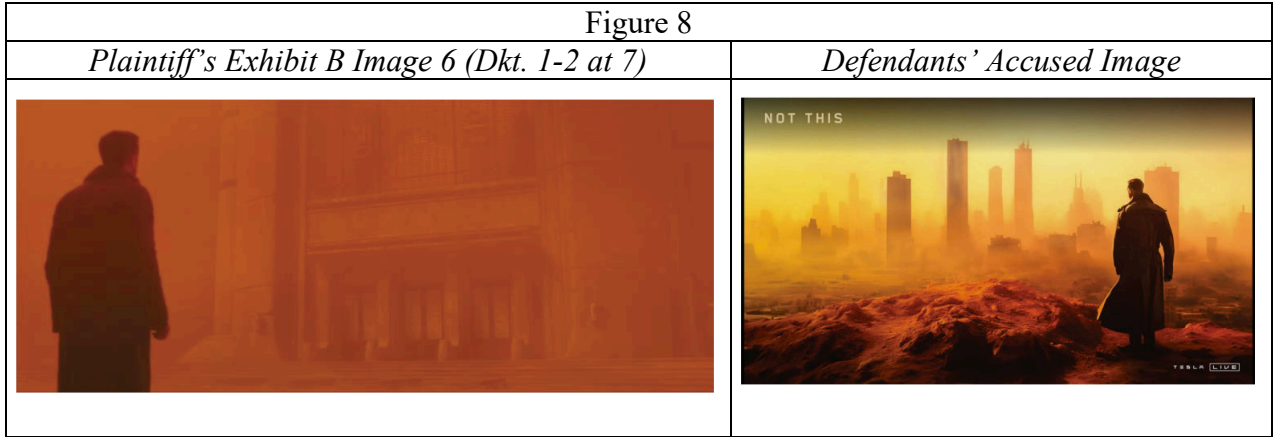
Figure 6



So too is the subject matter of the fifth and sixth images (Figs. 7 and 8). They are entirely different from the Accused Image.

Figure 7





A substantial similarity analysis does not stop with subject matter (*Rentmeester*, 883 F.3d at 1121-23)—but here, there is no need to go further. A simple comparison of Plaintiff's Images and the Accused Image reveals no substantial similarity. Plaintiff apparently seeks a copyright over the mere idea of “an orange-light-bathed ruined and abandoned cityscape” (Comp. ¶ 60)—but “[p]ermitting [it] to claim such a right would withdraw those ideas or concepts from the stock of materials available to other artists...thereby thwarting copyright's fundamental objective of fostering creativity.” *Rentmeester*, 883 F.3d at 1123 (cleaned up). This Court should dismiss because Plaintiff cannot maintain a claim for direct copyright infringement.

B. Plaintiff Fails to State a Claim for Vicarious and Contributory Copyright Infringement

Secondary liability cannot exist without direct copyright infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007). Because Plaintiff fails to state a claim for direct infringement the Court should also dismiss Plaintiff's second and third claims for vicarious copyright infringement and contributory copyright infringement. *E.g.*, *Johnson v. Maraj*, No. CV 23-5061 PA (AFMX), 2023 WL 8883316, at *3 (C.D. Cal. Dec. 15, 2023) (dismissing claims for contributory and vicarious copyright infringement because plaintiff failed to plausibly allege substantial similarity for direct infringement claim).

1 The vicarious copyright infringement claim should be dismissed for the
2 additional reason that Plaintiff fails to plausibly plead a key element: a **direct** financial
3 benefit from the alleged infringement. To state this claim, Plaintiff must plead that
4 Tesla and Musk each had (1) the right and ability to supervise the infringing acts and
5 (2) a direct financial interest in the infringing activity. *Perfect 10, Inc. v. Giganews,*
6 *Inc.*, No. CV 11-7098-ABC-SHX, 2013 WL 3610706, at *5 (C.D. Cal. July 10, 2013),
7 *aff'd*, 847 F.3d 657 (9th Cir. 2017). With respect to the second element, there must be
8 a direct **causal** relationship between the alleged infringement and financial benefit.
9 *Erickson Productions, Inc. v. Kast*, 921 F.3d 822, 829 (9th Cir. 2019) (“The essential
10 aspect of the ‘direct financial benefit’ inquiry is whether there is a **causal** relationship
11 between the infringing activity and any financial benefit a defendant reaps.”). This is
12 a strict requirement, and Plaintiff fails to meet it.

13 To illustrate, Plaintiff alleges that Tesla and Musk financially benefited from
14 the alleged infringement because it allowed them to “misappropriat[e] BR2049’s
15 goodwill⁵ to advance both (a) consumer appeal of the joint Tesla-WBDI cybercab
16 presentation itself..., and (b) consumer and investor interest in Tesla and the
17 cybercab.” Comp. ¶ 91. Plaintiff also alleges that Tesla avoided a highly speculative
18 expenditure “in the mid-six-figures...and possibly into the eight figures” for a
19 BR2049 brand affiliation. *Id.* ¶ 92. As to Musk, Plaintiff alleges on information and
20 belief that Musk **believed** that the purported affiliation of BR2049 with the Tesla
21 “Cybercab” would increase the likelihood of “a positive response with actual and
22 potential investors in Tesla” and consumer interest in “Cybercabs.” *Id.* ¶ 93.
23 According to Plaintiff, Musk believed he would benefit financially from the
24 infringement because such a positive response to the event would increase Tesla’s

25
26 ⁵ Plaintiff’s reliance on allegations of misappropriation of goodwill to state its
27 vicarious copyright infringement claim highlights the duplicative nature of its
28 copyright and Lanham Act claims. As discussed *infra* § IV(C), Plaintiff also fails to
state a cognizable claim under the Lanham Act.

1 stock price, and Musk is the largest Tesla shareholder and has compensation tied to
2 Tesla's stock price. *Id.* Under Ninth Circuit law, none of these allegations, even if
3 true, would constitute a direct financial interest.

4 In *Erickson*, the Ninth Circuit explained why similar allegations of financial
5 interest fail as a matter of law. The court vacated a jury verdict of vicarious copyright
6 liability where the plaintiff claimed, *inter alia*, that “(1) the [allegedly infringing]
7 photographs drew customers to purchase [defendant's] services; [and] (2) [defendant]
8 avoided paying licensing fees to Erickson.” 921 F.3d at 829. The court explained that
9 infringement that acts as a *draw* to the defendant's website may qualify as a direct
10 financial benefit, but infringing material that is “just an added benefit” does not. *Id.*
11 (citing *Ellison v. Robertson*, 357 F.3d 1072, 1078-79 (9th Cir. 2004)). Because the
12 plaintiff did not contend that anyone visited the defendant's website to view the
13 accused photographs or purchase defendant's services because they saw the
14 photographs, they were, at best, an “added benefit” insufficient to confer a direct
15 financial benefit on the defendant as a matter of law. *Id.* at 830. Here, Plaintiff's
16 allegations that the alleged infringement advanced consumer appeal of the
17 “Cybercab” presentation falls short of an allegation that it was a “draw” to the
18 presentation. The vague allegation that the alleged infringement increased consumer
19 and investor interest in Tesla and the “Cybercab” is also like the claim of a mere
20 “added benefit” that *Erickson* held fails to qualify as a direct financial benefit.

21 In fact, even a general allegation of a “draw” has been held insufficient to state
22 a vicarious copyright infringement claim. In *Bell v. Pac. Ridge Builders, Inc.*, the
23 court explained a plaintiff must plausibly allege more than that defendant's allegedly
24 infringing activities “generally acted as a draw for [defendant's] business” since
25 “vicarious infringement requires [plaintiff] to demonstrate a causal link between the
26 *infringing activities* and a financial benefit to [plaintiff].” No. 19-CV-01307-JST,
27 2019 WL 13472127, at *6 (N.D. Cal. June 4, 2019) (citing *Perfect 10, Inc. v.*

1 *Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017)) (emphasis in original) (cleaned
2 up). In dismissing the claim, the court explained plaintiff’s allegations “must support
3 a plausible inference that customers were drawn to [plaintiff’s] services because of
4 the infringing [post], meaning that the infringing material was a reason that they
5 purchased those services.” *Id.* (cleaned up). And because Tesla’s “Cybercab” is not
6 for sale, Plaintiff does not and cannot plead that use of the Accused Image has led to
7 any such sales.

8 The Ninth Circuit also held in *Erickson* that the avoidance of licensing fees
9 does not constitute a direct financial interest as a matter of law. 921 F.3d at 830. The
10 court first explained that a defendant’s avoidance of a licensing fee cannot be based
11 on that defendant’s own unlicensed use of the copyrighted work, since that concerns
12 direct, not vicarious liability. *Id.* The court then held that “the direct infringer’s
13 avoidance of fees alone cannot satisfy the requirement of a direct financial benefit to
14 the vicarious infringer” either. *Id.* “Otherwise, the requirement of a direct financial
15 benefit would be rendered meaningless, since—at least where, as here, licenses are
16 for sale—a direct infringer necessarily saves money by failing to obtain a license.” *Id.*
17 The same is true here, as Plaintiff’s allegations of the lost licensing fee are based on
18 “past actual brand affiliation contracts for automotive partners on BR2049.” Comp.
19 ¶ 92.⁶ Thus, the avoidance of a brand affiliation contract fee cannot form the basis of
20 the direct financial benefit required to assert this claim.

21 Plaintiff’s allegations about Musk’s financial interest in the alleged
22 infringement fare even worse. On purported “information and belief,” Plaintiff alleges
23 only that Musk ***believed*** that an affiliation with BR2049 would increase the ***likelihood***
24 of a positive response (which, as discussed above, is merely an “added benefit”) and
25 a Tesla stock price increase. Even taken as true, Musk’s belief is irrelevant and this
26

27 ⁶ The alleged cost savings is also speculative. Comp. ¶ 92 (alleging Tesla likely would
28 have had to pay for a brand affiliation, “*if Alcon had even been willing to do it at all*”).

1 allegation is far too indirect to satisfy a vicarious infringement claim. It does not allege
2 a financial benefit with a **causal** link to the alleged infringement as required. *Erickson*,
3 921 F.3d at 831 (a benefit is not “direct” if it would reach the defendant “only
4 incidentally”).

5 Paragraph 85 of the Complaint sums up the deficiencies in Plaintiff’s attempt
6 to plead a direct financial benefit: it claims “an incentive to permit infringement” only.
7 But neither an incentive nor a vague assertion of positive reactions to a presentation
8 suffice to plead that Tesla and Musk actually benefited financially from the alleged
9 infringement. *See Long v. Dorset*, 854 F. App’x 861, 864 (9th Cir. 2021) (affirming
10 dismissal of vicarious copyright infringement claim because allegations that plaintiff
11 paid Facebook to post advertisements for his page “do not suffice as allegations that
12 Facebook **made money** from [direct infringer’s] infringing posts on that page
13 specifically”).

14 **C. Plaintiff Fails to State a Lanham Act Claim for False Endorsement**

15 The false endorsement claim is implausible for a variety of reasons including
16 that Alcon does not own rights protected by the Lanham Act. It does not own the
17 “Blade Runner” name. Thus, a reference to “Blade Runner” cannot possibly refer to
18 Plaintiff. The other basis of this claim—Tesla’s and Musk’s alleged copying of
19 Plaintiff’s Images—is not prohibited by the Lanham Act. The Images are not
20 trademarks; nor are they a “**human** persona or identity.” 4 McCarthy on Trademarks
21 and Unfair Competition § 28:15 (5th ed.). The Lanham Act simply does not apply.

22 The claim also fails because it is based on the same allegations as Plaintiff’s
23 copyright claims, i.e., the alleged use of Plaintiff’s Images. *E.g.*, Comp. ¶¶ 24, 55, 91,
24 121-134. As a result, it is an improper attempt to circumvent copyright law. This is
25 not a permissible use of the Lanham Act, and no amount of amendment can cure this
26 claim. *Comedy III Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595-96 (9th Cir.
27 2000), *as amended on denial of reh’g and reh’g en banc* (Feb. 4, 2000) (stating “the
28

Lanham Act cannot be used to circumvent copyright law” and affirming dismissal of Section 43(a) Lanham Act claim with prejudice); *Rice v. Fox Broadcasting Co.*, 148 F. Supp. 2d 1029, 1066 (C.D. Cal. 2001) (noting that plaintiff’s arguments that a film character is a protectable mark for a false endorsement claim “largely repeat and/or blend into those he made in favor of finding **copyright** protection for this character” and holding that plaintiff cannot use the Lanham Act to circumvent the Copyright Act by attempting to claim trademark protection for that character).

**1. Plaintiff’s Claim is Not a Cognizable Lanham Act Claim
Because It Is Based on Rights Within the Scope of Copyright**

Section 43(a) “creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). Here, Alcon expressly asserts liability under the false association prong of § 1125(a)(1)(A) only, under the theory of false endorsement. The Ninth Circuit has recognized a false endorsement claim under § 1125(a)(1)(A) “for the unauthorized imitation of [an individual’s] distinctive attributes, where those attributes amount to an unregistered commercial ‘trademark.’” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106-07 (9th Cir. 1992), *abrogated on other grounds, Lexmark*, 572 U.S. at 1391; 4 McCarthy on Trademarks and Unfair Competition § 28:15 (5th ed.) (“Courts hold that in the context of § 43(a)(1)(A)... a human persona or identity is a kind of ‘trademark’ which is infringed by a false endorsement.”)

But Plaintiff does not claim the use of a human celebrity’s likeness or persona. Rather, it points to Musk’s reference to “Blade Runner”—a name Plaintiff does not own—and Musk’s alleged use of Plaintiff’s asserted copyright.

Courts have repeatedly stopped plaintiffs at the pleadings stage from proceeding with copyright-type Lanham Act claims, which is exactly what Plaintiff’s false endorsement claim is. For example, in a case involving the alleged infringement

1 of a film clip, just like here, the Ninth Circuit advised that it “will not entertain th[e]
2 expedition of trademark protection squarely into the dominion of copyright law, to
3 allow for Lanham Act coverage of a piece of footage taken directly from a film....”
4 *Comedy III*, 200 F.3d at 595. In *Comedy III*, the Ninth Circuit explained that to prevail
5 on its Lanham Act claim, the plaintiff “must show that the clip at issue is actually a
6 cognizable trademark.” *Id.* at 594-95. The Ninth Circuit rejected the plaintiff’s
7 “fanciful argument” that the clip (footage from a “The Three Stooges” film) was a
8 collection of trademarks because it “was clearly covered by the Copyright Act, 17
9 U.S.C. § 106, and the Lanham Act cannot be used to circumvent copyright law.” *Id.*
10 at 595. Notably, the court stated that “[i]ssues of secondary meaning are not the point
11 here, but rather the question is whether Comedy III has articulated a trademark interest
12 in the clip which would prevent [defendant] from using it...without Comedy III’s
13 permission.” *Id.* Thus, without even addressing Plaintiff’s allegations of secondary
14 meaning (which we address below for completeness), this Court can swiftly dismiss
15 Plaintiff’s fourth claim for relief as an improper attempt to circumvent copyright law.

16 The Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film*
17 *Corp.* also helps illustrate the fatal shortcomings of Plaintiff’s claim. 539 U.S. 23, 123
18 S.Ct. 2041, 156 L.Ed.2d 18 (2003). In *Dastar*, the plaintiffs raised copyright and
19 trademark claims against Dastar for copying, modifying, and repackaging a television
20 series into a videotape set under the theory that Dastar falsely designated the origin
21 of the products in violation of 15 U.S.C. § 1125(a). *Id.* at 26. The Supreme Court
22 distinguished the Lanham Act from copyright law and opined that rights within the
23 scope of copyright do not also give rise to Lanham Act claims. *Id.* at 34. The Court
24 explained that while a purchaser of a communicative product, such as a film, may care
25 who created the content therein, the Lanham Act should not be stretched to cover such
26 matters. *Id.* at 32-33. Doing so would cause the Lanham Act to conflict with copyright
27 law, which addresses that subject directly. *Id.* at 34, 36 (refusing to read “§ 43(a) of
28

1 the Lanham Act as creating a cause of action for, in effect, plagiarism” and cautioning
2 against “misuse or over-extension” of the Lanham Act, “into areas traditionally
3 occupied by...copyright”); *Slep-Tone Ent. Corp. v. Wired for Sound Karaoke & DJ*
4 *Servs., LLC*, 845 F.3d 1246, 1250 (9th Cir. 2017) (“When the claim is more accurately
5 conceived of as attacking unauthorized copying, *Dastar* requires us to avoid
6 recognizing a species of mutant copyright law by making such claims cognizable
7 under the Lanham Act” (cleaned up)).

8 Similarly, in *Carranza v. Lideres Entertainment Group*, this Court, citing
9 *Dastar*, dismissed a Section 43 claim for unfair competition as preempted by the
10 Copyright Act. No. CV 09-3604-GW-CWX, 2009 WL 10675974, at *3 (C.D. Cal.
11 June 29, 2009) (Wu, J.). Just as here, the plaintiff claimed that the defendant exercised
12 the plaintiff’s “rights protected by the Copyright Act.” *Id.* (explaining that plaintiff
13 essentially claimed that defendant “took his [music and video clips] and reproduced,
14 distributed, and sold it”); *LIVN Worldwide Ltd. v. Vubiquity Inc.*, No. 2:21-CV-
15 09589-AB-KS, 2022 WL 18278580 at *2 (C.D. Cal. July 22, 2022) (dismissing
16 § 43(a) claims under *Dastar* because “rights within the scope of copyright do not also
17 give rise to Lanham Act claims”).

18 Also instructive is *Lions Gate Ent. Inc. v. TD Ameritrade Servs. Co., Inc.*, in
19 which the plaintiff/copyright owner of the movie *Dirty Dancing* asserted that TD used
20 elements from the film in an advertising campaign for its financial services and that
21 such use would cause confusion about plaintiff’s endorsement of or association with
22 those services, or an association between TD’s advertisements and *Dirty Dancing*.
23 170 F. Supp. 3d 1249, 1267 (C.D. Cal. 2016). The court found that TD’s use of the
24 phrase “Nobody puts your old 401k in a corner” (based on the *Dirty Dancing* line
25 “Nobody puts Baby in a corner”) was a play on the concluding dance scene of the
26 film with images of a man lifting a piggy bank over his head, and reference to a song
27 played in the final scene of the film were potential violations of plaintiff’s **copyright**

1 in *Dirty Dancing*, but failed as a Section 43(a) claim. *Id.* at 1267-68 (citing *Dastar*,
2 539 U.S. at 37). Because plaintiff’s copyright and trademark claims were based on
3 the “exact claim and theory” (except for an allegation of consumer confusion) the
4 court dismissed the trademark claims with prejudice. *Id.* at 1268. Further, when
5 denying plaintiff’s motion to vacate the dismissal order, the court explained that,
6 because TD’s use of the alleged phrase with other elements from the film “served to
7 evoke the communications, concepts, or ideas embodied in” the film, plaintiff’s
8 trademark claims were barred under *Dastar*, as the Lanham Act does not protect rights
9 in a communicative product that are distinct from those already protected by the
10 Copyright Act. *Lions Gate Ent., Inc. v. TD Ameritrade Servs. Co., Inc.*, No. 2:15-
11 05024-DDP-E, 2017 WL 4621541, at *4 (C.D. Cal. Oct. 16, 2017).

12 The facts alleged by Lions Gate almost mirror those alleged by Alcon. Here,
13 Plaintiff alleges that Tesla and Musk used the Accused Image in the context of Musk
14 stating “You know, I love ‘Blade Runner,’ but I don’t know if we want that future,”
15 and that this was “likely to cause confusion...as to the affiliation, connection or
16 association of Tesla and Musk with Alcon or as to the sponsorship or approval of
17 Tesla’s or Musk’s goods, services, or commercial activities by Alcon.” Comp. ¶¶ 57-
18 58, 125. Plaintiff’s allegations boil down to the assertion that consumers will be
19 confused that Alcon sponsored or approved, or is affiliated with, Defendants’ “goods
20 and services.” *Id.* ¶¶ 125, 127-28. But all Defendants did was “evoke the
21 ‘communications, concepts, or ideas’ embodied in the movie,” just like in *Lions Gate*.

22 Lastly, in light of Plaintiff’s allegations of “false representations,” including
23 that Tesla’s and Musk’s actions “have the effect of falsely representing that Tesla’s
24 and Musk’s goods and services are licensed...or otherwise authorized by Alcon”
25 (Comp. ¶¶ 124-25, 127), any attempt to amend Plaintiff’s Lanham Act claim to a false
26 advertising claim under Section 43(a)(1)(B) would be futile because *Dastar* would
27 still preclude such a claim. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137,
28

1 1143-44 (9th Cir. 2008) (citing *Dastar* and holding that misrepresenting compliance
2 with licensing policies is not actionable under the Lanham Act “to avoid overlap
3 between the Lanham and Copyright Acts”); *Urban Dollz LLC v. Lashify, Inc.*, No.
4 CV 23-1427-GW-AFMX, 2023 WL 8292459, at *9 (C.D. Cal. Oct. 17, 2023) (Wu,
5 J.) (recognizing that the Ninth Circuit “extended” *Dastar*’s rationale to a Section
6 43(a)(1)(B) claim and granting motion to dismiss).

7 **2. Plaintiff Fails to Plead Trademark Rights in “Blade Runner”**
8 **or Any Images from BR2049**

9 As the Supreme Court warned in *Dastar*, “[Section] 43(a) does not have
10 boundless application.” 539 U.S. at 29 (cleaned up).

11 The “false association” basis of liability under Section 43(a) claimed by
12 Plaintiff addresses “false representations concerning the origin, association, or
13 endorsement of goods or services through the wrongful use of another’s distinctive
14 mark, name, trade dress, or other device.” *Waits*, 978 F.2d at 1108. The Complaint
15 does not expressly state what “distinctive mark, name, trade dress, or other device”
16 Plaintiff believes Defendants used. Rather, Plaintiff points to use of the words “Blade
17 Runner” (without “2049”) and the Accused Image.

18 As an initial matter, Plaintiff does not assert ownership over any trademark
19 rights in the phrase “Blade Runner” or the “original 1982 ‘Blade Runner’ motion
20 picture” (Comp. ¶ 26). In fact, Plaintiff goes out of its way to specify that Musk said
21 “‘Blade Runner’ without the year number” (2049) that distinguishes its film from the
22 original. *E.g., id.* ¶ 58. Plaintiff’s allegations that Musk nevertheless must have
23 “meant to evoke” BR2049 for various reasons based on the differing contents of
24 BR2049 and the 1982 Picture are irrelevant absent any claim in trademark rights in
25 the actual words spoken by Musk.⁷

26 ⁷ Plaintiff’s attempt to allege “special secondary meaning” over the use of “Blade
27 Runner” (without “2049”) with the intent to “evoke BR2049” by displaying the
28

1 Plaintiff's attempt to claim trademark rights and secondary meaning over the
2 still images from BR2049 also fails. As discussed *supra* § IV(C)(1), the Ninth Circuit
3 has specifically rejected a trademark claim based on a film clip. There is no reason
4 for a different outcome here. In addition to improperly cloaking a copyright claim as
5 a Lanham Act claim, Plaintiff's Images cannot be trademarks because they serve no
6 source identifying function. 15 U.S.C. § 1127 (defining "trademark" as a word, name,
7 symbol, or device used "to indicate the source of the goods"). Unsurprisingly,
8 undersigned counsel is aware of *no* case in which a still image from a film has
9 achieved trademark status to be the basis of any Lanham Act claim.

10 And it is of no import that Plaintiff's Images "immediately evoke[] BR2049
11 and everything the Picture stands for" (Comp. ¶¶ 33, 124). This is not "secondary
12 meaning" as Plaintiff repeatedly claims (*e.g.*, *id.* ¶¶ 58, 123), and the Images do not
13 function as "marks" or a "brand" to identify the source of goods or services. 2
14 McCarthy on Trademarks and Unfair Competition § 15:1 (5th ed.) (explaining that
15 secondary meaning "is a new and additional meaning that attaches to a non-inherently
16 distinctive word or symbol" that identifies and distinguishes a "single commercial
17 source" and "if a designation is not *used* as a mark to identify and distinguish source,
18 it cannot possibly achieve a secondary meaning" (emphasis in original)).

19 Here, Plaintiff alleges that Defendants "appropriate[d] BR2049's special
20 secondary meaning in the context of trying to sell artificially autonomous cars"
21 (Comp. ¶ 64) yet does not allege any use (especially trademark use) of the Images in
22 connection with autonomous cars itself. Rather, Plaintiff's allegations that it is "in the
23

24 Accused Image, which Plaintiff asserts share features of its Images (Comp. ¶¶ 57-64),
25 is also similar to how the *Lions Gate* plaintiff failed to assert false association when
26 it relied "not only on the alleged mark, but also on other elements from the film *Dirty*
27 *Dancing*." 170 F. Supp. 3d at 1269; 1255 (describing allegations that failed to state a
28 Section 43(a) claim including that defendant's advertisements used images to
"conjure up *Dirty Dancing*" and lines that "invoked" a song in the film's final scene).

process of engaging with automotive brands” on partnerships for a BR2049-derived sequel or spin-off television series and has merely “*potential* auto brand partners” for that series (Comp. ¶¶ 37, 70) show that such use is speculative.⁸ Even if there was such use, Plaintiff’s Images would still fall under the purview of copyright law, not trademark law.

V. CONCLUSION

For the reasons stated above, the Complaint can be dismissed with prejudice, in its entirety.

Dated: February 4, 2025

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⁸ Allegations that the fictional “spinner” in BR2049 has been featured in a museum exhibit and was branded under an automotive brand (Comp. ¶¶ 35-36) are irrelevant. Plaintiff does not allege Defendants used any image or characteristic of the spinner, nor can it, as there is no vehicle in the Accused Image.

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28 **CERTIFICATE OF COMPLIANCE**

29 The undersigned, counsel of record for Defendants Tesla, Inc. and Elon Musk
30 certify that this brief contains 6,969 words, which complies with the word limit of
31 L.R. 11-6.1.

32 /s/ Christopher S. Marchese
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